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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JAMES M. MURPHY, District Judge of the Fourth Judicial District of the State of Nebraska, Douglas County, Nebraska,

Appellant,

v.

EUGENE L. HUNT, *Appellee.*

On Appeal from the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICUS CURIAE THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF APPELLEE

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 80-2165

JAMES M. MURPHY, District Judge of the Fourth Judicial District of the State of Nebraska, Douglas County, Nebraska,

Appellant,

-v.-

EUGENE L. HUNT,

Appellee.

BRIEF OF AMICUS CURIAE THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF APPELLEE

STATEMENT OF INTEREST[1/]

The American Civil Liberties Union ("ACLU") is a national, nonpartisan, nonprofit organization of over 200,000 members dedicated to protecting personal liberty through a

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1/ The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court pursuant to Rule 36.2 of the Rules of this Court.

vigorous defense of the safeguards embodied in the Bill of Rights. Since its founding in 1920, the ACLU has appeared before this Court, either as counsel or amicus, on more than one thousand occasions in support of those safeguards.

Constitutional protections in the area of criminal procedure have been one of the ACLU's principal areas of concern. The ACLU has appeared in numerous criminal procedure cases before this Court, including such landmark cases as Gideon v. Wainwright, 372 U.S. 335 (1963); Miranda v. Arizona, 384 U.S. 436 (1966); Witherspoon v. Illinois, 391 U.S. 510 (1968); and Terry v. Ohio, 392 U.S. 1 (1968).

The ACLU believes that the right to be free of unreasonable pretrial detention plays a critical role in assuring fairness in the overall criminal process. The ACLU is concerned that this right is threatened by the power asserted by the State of Nebraska

in the present action categorically to detain persons charged with certain noncapital offenses prior to trial solely on the basis of probable guilt. The history and traditions of this country afford no precedent for such pretrial detention. The ACLU's interest here is to answer the sweeping claims of power made by the State of Nebraska and to demonstrate the patent unconstitutionality of the Nebraska pretrial detention provision.

SUMMARY OF ARGUMENT

Article I, section 9 of the Nebraska constitution was amended in 1978 categorically to deny bail to persons charged with sexual offenses involving force "where the proof is evident or the presumption great." In a comprehensive and well-reasoned opinion, the Eighth Circuit found that this Nebraska provision violates the due process guarantees applicable to the states through the fourteenth amendment. Hunt v. Roth, 648 F.2d 1148 (8th Cir. 1981), prob. juris. noted, 50 U.S.L.W. 3244 (October 6, 1981). The Nebraska provision requires the incarceration of defendants charged with forcible sexual offenses solely on the basis of probable guilt of the offense charged. Precluding the trial court from examining any of the circumstances relating to an individual defendant's likelihood of appearing for trial or even his dangerousness to the community, the Nebraska constitutional provision creates an absolute, irrebuttable presumption that anyone charged with this

one type of noncapital offense may not even be considered for bail so long as the prosecutor can offer some evidence or even a strong presumption that the defendant committed the crime which stands charged but not proven. Such an automatic denial of liberty without even the most rudimentary procedural protections is a clear violation of the guarantees of the due process clause.

The present case is not the proper occasion to resolve the serious constitutional issues raised by preventive detention of noncapital defendants based on a judicial finding of dangerousness. The State of Nebraska has attempted to frame the issues in a way that would require this Court to resolve in the context of this case those questions, which raise profound implications for the character of criminal justice in this country. The ACLU has long taken the position that alleged "dangerous" propensities are neither a traditional nor constitutionally valid basis for denying bail to a defendant

prior to trial. Nonetheless, this case -- a challenge to a three-year-old constitutional provision which comes to this Court on a record stripped of the factual setting in which the provision was invoked -- affords no basis for examining the constitutionality of preventive detention enactments, which allow denial of bail based on a finding of dangerousness. Denial of bail under the Nebraska provision is not premised on a judicial finding that an individual defendant is likely to represent a danger to the community if released. As interpreted by the Supreme Court of Nebraska, dangerousness is irrelevant to the decision to detain; as long as the evidence relating to the present charge is sufficient, the defendant is automatically "ineligible for bail." Parker v. Roth, 202 Neb. 850, 278 N.W.2d 106, 115, 117-18, cert. denied, 444 U.S. 920 (1979). Under well-settled principles of judicial restraint, this Court should refrain from addressing the propriety of preventive

detention based upon dangerousness in the abstract setting in which those questions are raised here.

This challenge to the constitutionality of the Nebraska provision presents narrow issues. The Nebraska provision denies the procedural due process guarantees of rights of confrontation and cross examination required by Specht v. Patterson, 386 U.S. 605 (1967). It prevents consideration of evidence bearing on the individual defendant's likelihood of flight or even dangerousness. The irrebuttable presumption against bail for this one class of noncapital offenders, is not based on any data or any rational basis for concluding that such defendants are less likely to appear for trial or are more likely to commit other crimes while out on bail than any other class of noncapital defendants. The provision abridges the presumption of innocence guaranteed by the due process clause. It denies an individualized determination of eligibility for pretrial release under

traditional criteria in violation of the excessive bail clause of the eighth amendment. Finally, it violates fundamental substantive guarantees "[f]or under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." Bell v. Wolfish, 441 U.S. 520, 535 (1979).

This experiment by the State of Nebraska with the liberties of the American people is patently unconstitutional on its face. This Court should hold the Nebraska provision null and void.

ARGUMENT[2/]

I.

THE BROAD CONSTITUTIONAL ISSUES RAISED BY PRETRIAL DETENTION OF CRIMINAL DEFENDANTS FOR "DANGEROUS" PROPENSITIES ARE NOT PROPERLY PRESENTED FOR ADJUDICATION IN THIS CASE

On the basis of the challenged Nebraska constitutional provision,[3/] appellee-defendant Eugene Hunt was imprisoned for 4 months prior to his trial on charges of first-degree sexual assault, nonforcible sexual assault (statutory

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2/ The ACLU wishes to acknowledge the contributions of the following students at the Harvard Law School who assisted in the preparation of this brief: Sarah Fox, Nicolas Grabar, and Laurence Shtasel.

3/ Article I, section 9, of the Nebraska constitution provides as follows:

> "All persons shall be bailable by sufficient sureties, except for treason, sexual offenses involving penetration by force or against the will of the victim, and murder, where the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." (Emphasis added.)

The underscored amendments were added in 1978 pursuant to a popular referendum.

rape) and several accompanying counts of nonsexual felonies. Because of the circumstances of this case, the record does not indicate the factual basis upon which the trial judge concluded that the evidence or presumption against the defendant precluded his being considered for bail.

Defendant initially appeared on the charges in Omaha Municipal Court, where he was admitted to bail on the nonsexual charges, but denied bail on the sexual offense charges. Defendant subsequently appeared with counsel before Douglas County District Court Judge James M. Murphy for a review of the bail denial, but because both defendant and the state's attorney stipulated to the evidentiary requirement that "the proof [be] evident or the presumption great," no inquiry was made into the factual basis for this finding. Defendant then brought a collateral action challenging the bail denial in federal court. The parties again entered into a stipulation permitting the court to rule on defendant's

claims without inquiry into the factual and procedural setting in which the decision to detain was made.

Procedural protections for those defendants who have been charged with offenses covered by the provision are, however, minimal. Nebraska does provide bail hearings for all criminal defendants, Neb. Rev. Stat. § 29-901.01 (1979), but it does not appear that defendants are entitled to counsel as a matter of right until the appeal stage of the proceeding. Neb. Rev. Stat. § 29-901.03. Moreover, the evidence presented at the hearing need not conform to the normal rules of admissibility in a court of law, Neb. Rev. Stat. § 27-1101(4)(b), so that the State is free to offer hearsay and unreliable identification testimony.

Although the State depicts this Nebraska provision as a means for "the protection of society from repetition of . . . heinous crimes" (Appellant's Brief at 28),

the provision in fact has nothing to do with dangerousness. The Nebraska provision, on its face, requires the incarceration of persons charged with sexual offenses solely on the basis of probable guilt of the offense charged. Nothing in the record suggests that trial judges are even permitted to consider dangerousness to society in determining eligibility for bail under the Nebraska provision. Indeed, as interpreted by the Supreme Court of Nebraska, such considerations are irrelevant to the decision to detain; as long as the evidence relating to the present charge is sufficient, the defendant is automatically "ineligible for bail." Parker v. Roth, supra, 278 N.W. 2d at 115, 117-18.4/

4/ Despite the State's assertion that it remains within the discretion of the trial judge to grant or deny bail even in cases where the judge is persuaded that "the proof is evident or the presumption great," (Appellant's Brief at 31), the Supreme Court of Nebraska has clearly construed the provision as requiring the denial of bail where that evidentiary requirement has been met. In Parker v. Roth, supra, the Court stated that "[i]n order for one so charged to be ineligible for bail, it must appear to the trial court that either the proof of the charge

[Footnote continued on following page

This case also comes to this Court stripped of a record as to how the provision is actually applied in the State of Nebraska. The parties' stipulation that the evidentiary standard that the "proof [be] evident or the presumption great" had been met in the present case foreclosed any possibility that the lower courts might have reversed the denial of bail for insufficiency of evidence, avoiding the need to reach federal constitutional issues. Moreover, the stipulations precluded the development of a record reflecting the manner in which the evidentiary standard is applied by trial judges in the State of Nebraska.

[Footnote continued]
is evident or the presumption great." 278 N.W.2d at 115 (emphasis added). See also id. at 117-18 ("Based upon the stipulation entered into in this case, appellant was not eligible for bail.) (emphasis added). As this Court stated in Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270, 274 (1940), the state court's construction of a state enactment "is binding upon us . . . For the purpose of deciding the constitutional questions appellant raises we must take the statute as though it read precisely as the highest court of the State has interpreted it."

The stipulation supplies no meaningful information, since the evidentiary standard which the parties agreed had been met itself has no commonly accepted content. The legislative history of the challenged provision provides no guidance as to the level of proof the standard was intended to require; indeed, the comments of the amendment's supporters suggest that it is within the discretion of the trial judge to decide for himself whether there is sufficient evidence to imprison a particular defendant.[5/] Nor are we aware of any case in which the Nebraska courts have interpreted the standard.[6/] Thus, this Court

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5/ See, e.g., Comments of Senator Duis during the April 12, 1978 floor debate at p. 08920 ("[T]his Constitutional amendment would require that of course the proof is evident and the presumption has to be great. The judge does not have to do this unless those factors are there and left to his discretion"); comments of Senator Labedz during the January 26, 1978 meeting of the Committee on Constitutional Revision and Recreation at p. 16 ("[T]he judge is the one who will determine it").

6/ In Parker v. Roth, 202 Neb. 850, 278 N.W.2d 106 (1979), cert. denied, 444 U.S. 920 (1979), the only case in which the Supreme Court of Nebraska has examined the state constitutional provision at issue here, the court did not

[Footnote continued on following page]

has no basis for finding that a constitutionally adequate quantum of evidence is required to satisfy that standard under state law, or that the burden of proof is placed on the appropriate party.

Although the proviso that the "proof is evident or the presumption great" has historical antecedents and was used by the Continental Congress in the Northwest Ordinance of 1787, see Foote, The Coming Constitutional Crisis of Bail I and II, 113 U. Pa. L. Rev. 959, 999, 1125, 1164-1186, 970 (1965) (hereinafter cited as "Foote Article"), and appears in a number of state constitutions, it has been interpreted in a variety of ways. As one scholar found, there is a three-way split among jurisdictions interpreting the language as to the allocation of the burden of proof; moreover, there are as many as 20 different state court formulations of the

[Footnote continued]
address itself to the meaning of the proviso that "proof is evident or presumption great" because counsel for the parties in that case had entered into a similar stipulation that its requirements had been met.

amount of proof which it requires. Thaler, Punishing the Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial, 1978 Wis. L. Rev. 441, 444-46.

This is clearly not the appropriate case to resolve the complicated issues raised by preventive detention based on a judicial finding of "dangerousness" or to uphold the constitutionality of such enactments. The challenged enactment does not even pose directly the propriety of detaining defendants found to be "dangerous." Moreover, the parties' stipulation of law and fact has deprived this case of a meaningful factual foundation for such a ruling.

In similar situations, this Court has followed a policy of self-restraint, declining to rule on issues not concretely presented. This policy reflects the limitations on federal judicial power when undertaking "the most important and the most delicate of the Court's functions," that is,

deciding constitutional issues. Rescue Army v. Municipal Court, 331 U.S. 549, 569 (1947); Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 461 (1945).

The broad constitutional issue that this Court is asked to resolve -- whether and in what circumstances the pretrial detention of a supposedly dangerous defendant is constitutionally permissible -- cannot be resolved on the record of this case. Too little is known about the workings of the Nebraska provision -- the standards it employs, the procedures it requires, the evidence it demands -- to uphold the constitutionality of preventive detention. As this Court stated in Speiser v. Randall, 357 U.S. 513, 520 (1958), where the vindication of legal rights depends on how the factfinder appraises the facts, "the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied." The record in this case provides no insight into

those concerns.7/

Where, as here, only a skeletal record is available, and the legal issue pressed by the State is not even posed directly, the Court should refrain from deciding broad constitutional issues dependent on a fully developed factual and legal basis. The 11 word amendment to the Nebraska constitution at issue in this case is not an enactment authorizing pretrial detention based on a judicial finding of dangerousness. The resolution of those far-reaching issues should await the proper occasion.

7/ In Socialist Labor Party v. Gilligan, 406 U.S. 583, 587 (1972), this Court declined to resolve weighty constitutional issues on the basis of such an "extraordinarily skimpy" record. See also Cowgill v. California, 396 U.S. 371 (1970) (per curiam) (Harlan, J., concurring) (stipulated statement of facts inadequate to decide constitutional questions); DeBacker v. Brainard, 396 U.S. 28, 32 (1969) (per curiam) (constitutional issue not decided due to "barrenness" of record); International Brotherhood of Teamsters v. Denver Milk Producers, Inc., 334 U.S. 809 (1948) (per curiam) ("inadequacy" of record prevents determination of constitutional issue).

II.

THE NEBRASKA PROVISION VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE IT ARBITRARILY DENIES BAIL TO A CLASS OF DEFENDANTS, EVEN WHERE A DEFENDANT IS NOT "DANGEROUS" AND POSES NO RISK OF FLIGHT

Although the issues in this case have been framed so as to request this Court to address pretrial detention of supposedly "dangerous" criminal defendants, the issue in fact presented is narrow. Regardless of the State's asserted purpose in amending its constitution, it is apparent from the face of the amended provision that it not only permits but requires the pretrial imprisonment of persons charged with one type of noncapital offenses who are not dangerous, and pose no risk of flight, merely because it "appear(s) to the trial court that either the proof is evident or the presumption great." Parker v. Roth, supra, 278 N.W.2d at 115 (1979). The question thus presented is whether the arbitrary denial of bail to this selected category of criminal defendants can be squared

with the dictates of the due process clause of the fourteenth amendment.

Under Nebraska law, the critical determination as to whether the evidence against an alleged sexual offender is sufficient to render him ineligible for bail is within the discretion of the trial judge. As we have shown, the requirement that "the proof [be] evident or the presumption great" has no established meaning, and provides no guidance as to where the burdens of production and persuasion lie, or on what quantum of evidence the trial judge is to conclude that the evidentiary requirement has been met. See In re Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring) (the purpose of a proper evidentiary standard is to instruct "the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions"). The Supreme Court of Nebraska, in the one case interpreting the amended provision, indicated only that it requires a showing

of some evidence in addition to the "mere filing of a charge." Parker v. Roth, supra, 278 N.W.2d at 115.

In the absence of any meaningful substantive or procedural limits on the exercise of the judge's discretion in making the determination that "the proof is evident or the presumption great," a Nebraska defendant charged with a specified sexual offense could be denied bail and imprisoned before trial on the basis of hearsay testimony by the arresting officer as to statements by the alleged victim. Moreover, because the Nebraska constitution requires that bail be denied to any defendant against whom the proof of the present charge appears sufficiently great, evidence relating to the defendant's likelihood of flight or even dangerousness has no bearing on the decision to detain. Even if the defendant were a family man with strong community ties and no history of antisocial conduct, who was prepared to offer detailed character and psychiatric evidence to show

that he was not dangerous and posed no risk of flight, the trial judge would have no choice but to detain him, as long as the judge believed there was sufficient evidence supporting the charge to satisfy the minimal requirements imposed by the vague language of the Nebraska provision.

Since the Nebraska provision effectively precludes rather than encourages inquiry into factors directly related to risk of flight or, for that matter, dangerousness, it clearly serves no purpose even conceivably related to the proper function of bail. It simply advances the point at which a defendant can be jailed for a criminal offense from the post-conviction stage to the pretrial stage. Under Nebraska law, even a convicted sexual offender might receive only a one-year sentence; yet the constitutional provision at issue here mandates the incarceration of persons merely charged with sexual offenses -- who might wait as long as a year or more for

trial[8/] -- on the basis of less evidence than would be required to convict them. The arbitrariness of this practice renders it unconstitutional under the due process clause of the fourteenth amendment.

In Specht v. Patterson, 386 U.S. 605 (1967), this Court considered a due process challenge to a Colorado procedure permitting indeterminate sentencing without full hearing of convicted sex offenders found to be a threat to the public. Noting that this procedure made "one conviction the basis for commencing another proceeding under another Act," id. at 608, providing for more severe sentencing, this Court held the Colorado procedure invalid. This Court stated:

> "Due process . . . requires that [the defendant] be

8/ The Nebraska speedy trial provisions require that a defendant be brought to trial within six months, but there are several exceptions including one for continuances sought by the prosecution to secure material evidence. See Neb. Rev. Stat. § 29-1207.

> present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed. . . . None of these procedural safeguards we have mentioned is present under Colorado's Sex Offenders Act." Id. at 610-11.

The Specht case stands for the proposition that additional punishment may not be meted out to convicted sex offenders without full due process protections. It follows a fortiori that the imposition without such procedural protections of additional punishment -- in the form of denial of pretrial release -- upon persons merely charged with sex offenses violates the dictates of the due process clause.

It cannot be questioned that the Nebraska provision encroaches upon fundamental rights to personal liberty protected by the fourteenth amendment. The due process clause, by its express terms, protects all persons

from deprivations of "life, liberty or property" without due process of law, and "[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary government action." Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex, 442 U.S. 1, 18 (1979) (Powell, J., concurring), citing Ingraham v. Wright, 430 U.S. 651, 673-74 (1977); Board of Regents v. Roth, 408 U.S. 564, 572 (1972). For the criminal defendant, as for any other person, the interest in personal liberty is "an interest of transcending value," Speiser v. Randall, supra, 357 U.S. at 525; it is not extinguished simply because a person has been charged with a criminal offense.

To confine a defendant to jail pending trial is to deprive him of his liberty altogether. Defendants awaiting trial are often housed under conditions worse than those afforded to convicted and sentenced felons. See generally L. Katz, Justice is the Crime:

Pretrial Delay in Felony Cases 56-58 (1972). Where "reasonably necessary" to the operation of the detention facility, they may be required to submit to the same harsh and restrictive security measures applied to prison inmates. Bell v. Wolfish, 441 U.S. 520 (1979). The impact on the individual can be devastating: "It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time." Barker v. Wingo, 407 U.S. 514, 532-33 (1972).

Detainees subject to such oppressive conditions have been found to be more likely to plead guilty.9/ Persons subject to pretrial incarceration are also more likely to be convicted if tried, and more likely to receive

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9/ One study of several hundred New York City detainees found that 79 percent of those defendants who were detained pled guilty compared with only 49 percent of those who were released. The Unconstitutional Administration of Bail: Bellamy v. The Judges of New York City, 8 Crim. L. Bull. 459, 467 (1972) (hereinafter cited as "Bellamy Study").

harsher sentences if convicted.[10] This is hardly surprising, given that the incarcerated defendant cannot freely consult with his lawyer, is more readily available for police interrogation, and appears in court in the custody of police. The difficulties the defendant may face in preparing his defense were graphically described by this Court in Smith v. Hooey, 393 U.S. 374, 379-80 (1969):

> "Confined in a prison, . . . his ability to confer with potential defense witnesses, or even to keep track of their whereabouts is obviously impaired. And, while 'evidence and witnesses disappear, memories fade, and events lose their perspective,' a man isolated in prison is powerless to

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10/ The two major studies in this area isolated several factors traditionally thought relevant to the disposition of a case, including previous record, family relationships, and employment stability. The researchers held these factors constant, and found that there was a causal relationship between detention and unfavorable disposition of the case. Rankin, The Effect of Pretrial Detention, 39 N.Y.U. L. Rev. 641 (1964); Bellamy Study, supra; see also Zeisel, Bail Revisited, 1979 Am. B. Foundation Research J. 769, 779 (1979).

> exert his own investigative efforts to mitigate these erosive effects of the passage of time."

Thus, pretrial incarceration infringes not only the defendant's interest in personal liberty but also his right to receive a fair trial, "a fundamental liberty secured by the Fourteenth Amendment." Estelle v. Williams, 425 U.S. 501, 503 (1976).11/

The Nebraska provision violates the procedural guarantees of the due process clause because the State has failed to provide for

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11/ It goes without saying that a detainee is also deprived of his right to privacy, see Roe v. Wade, 410 U.S. 113, 152-53 (1973), and to travel, see Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974), his right to walk about freely, see Papachristou v. City of Jacksonville, 405 U.S. 156 (1972), and to associate with persons of his own choice, see NAACP v. Alabama, 357 U.S. 449 (1958), as well as his freedom to choose and maintain his family relationships, see Stanley v. Illinois, 405 U.S. 645 (1972); Moore v. East Cleveland, 431 U.S. 494 (1977). "Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent." Barker v. Wingo, supra, 407 U.S. at 533.

procedures to ensure that a defendant subject to pretrial incarceration receives a meaningful hearing before he is deprived of his liberty. As noted above, defendants in Nebraska have no right to counsel at the initial bail hearing, and because the normal rules of evidence do not apply at bail hearings, they have no right to confront the witnesses against them. While such a hearing might be adequate to protect the interests of a defendant in a typical bail proceeding, where the presumption is that the defendant will be released and the only issue is the amount at which bail will be set, it is wholly inadequate to protect the interests of a defendant who faces automatic imprisonment if the trial judge decides that the proof against him is "evident."

The absence of confrontation rights alone constitutes a denial of due process, for even in dealing with the "conditional liberty" interest of convicted felons, Morrisey v. Brewer, 408 U.S. 471, 480 (1972),

this Court has held that confrontation rights must be provided at preliminary hearings to revoke parole, Morrisey, 408 U.S. at 487, or probation, Gagnon v. Scarpelli, 411 U.S. 778, 782 & n.5 (1973), and at hearings to consider transfer of a prisoner to a mental hospital, Vitek v. Jones, 445 U.S. 480, 496 (1980). As the Court said in Goldberg v. Kelly, 397 U.S. 254, 269 (1970), where confrontation was mandated in welfare termination hearings: "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." See also Greene v. McElroy, 360 U.S. 474, 496-97 (1959).

The dangers posed by the absence of procedural safeguards for sex offense defendants facing pretrial incarceration in Nebraska are aggravated by the impermissible vagueness of the evidentiary standard. In Giaccio v. Pennsylvania, 382 U.S. 399 (1966), for example, this Court struck down on due

process grounds state legislation which authorized juries to assess costs against defendants acquitted of criminal charges without identifying the factors to be considered in determining whether assessment was appropriate in a particular case. The parallel defect in the Nebraska provision is that it permits the trial judge to make the critical factual determination on which the denial of bail turns without authoritative legislative or judicial guidance as to the quantum of evidence needed to satisfy the standard.

The inadequate procedures under the Nebraska provision also violate procedural due process by abridging the presumption of innocence guaranteed by the fourteenth amendment. "The principle that there is a presumption of innocence in favor of the accused . . . lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453 (1895); accord Taylor v. Kentucky, 436 U.S. 478, 483

(1978). The presumption is accordingly incorporated in the protections of the due process clause of the fourteenth amendment. In re Winship, supra, 397 U.S. at 361-64 (1970).

This Court held in Stack v. Boyle, 342 U.S. 1 (1951), that enforcement of the presumption of innocence requires a right to a meaningful individualized hearing on eligibility for pretrial release:

> "Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." 342 U.S. at 4.

See also McGinnis v. Royster, 410 U.S. 263, 273 (1973).

Thus, this Court in Stack v. Boyle emphatically rejected the notion, advanced by the State in this case, that the presumption of innocence is "in actuality not a real presumption" and means "nothing more than that it is for the prosecution to adduce

evidence and produce persuasion beyond a reasonable doubt." Appellant's Brief at 35.[12] This Court has recognized instead that the right to a meaningful hearing on eligibility for pretrial release is an integral part of a protective scheme which gives meaning to the "presumption of innocence."

It is, on its face, inherently destructive of the presumption of innocence and fundamental considerations of due process to base pretrial detention on a determination without full procedural protections that the defendant is probably or presumptively guilty of the offense charged. This is an

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12/ This Court's rejection of the presumption as a basis for challenging the prison conditions at issue in Bell v. Wolfish, 441 U.S. 520, 532-33 (1979), does not support the State's position. This Court made clear in Wolfish that the initial decision to detain -- which is challenged directly in the present case -- was not at issue there. Id. at 533-34. To view this Court's comments in Wolfish as making the presumption irrelevant to the decision to detain an unconvicted defendant would be squarely inconsistent with repeated pronouncements by this Court of the "fundamental" character of that right. See id. at 582 n.11 (Stevens, J., dissenting).

impermissible shortcut through the constitutional process of determining guilt. For these reasons, the Nebraska provision should be struck down as violative of the procedural guarantees of the due process clause of the fourteenth amendment.

III.

THE NEBRASKA PROVISION VIOLATES THE GUARANTEE OF THE EIGHTH AMENDMENT APPLICABLE TO THE STATES THROUGH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT THAT "EXCESSIVE BAIL SHALL NOT BE REQUIRED"

The eighth amendment guarantees to citizens of the United States that "excessive bail shall not be required." This constitutional protection is fundamental by every test this Court has applied and therefore extends to the states through the due process clause of the fourteenth amendment. Central to the eighth amendment is a constitutional right to a meaningful individualized determination of eligibility for pretrial release -- a right the State of Nebraska has denied to persons charged with forcible sexual offenses.

A. The Excessive Bail Clause of the Eighth Amendment Renders Unconstitutional a Law Categorically Denying Pretrial Release to Noncapital Defendants Without Consideration of Relevant Individual Factors.

The right to an individual evaluation of eligibility for pretrial release, based upon relevant criteria beyond the offense charged, is fundamental to the American system of justice. This right is embodied in the guarantee of the eighth amendment that criminal defendants be free from unreasonable denial of pretrial release. The importance of this right is attested to by its uninterrupted observance in Anglo-American jurisprudence.

The institution of bail originated in medieval England, and was first codified in the Statute of Westminster the First, 1275, 3 Edw. 1, c. 15, which provided a detailed enumeration of which offenses must be bailable and which were nonbailable offenses. In succeeding centuries, additional statutes were enacted which further defined those

offenses for which bail must be set. See 4 Holdsworth, A History of English Law 526-28 (3d ed. 1945).

In addition, English bail law was shaped by three important developments: The Petition of Right of 1627, 3 Car. 1, c. 1; the Habeas Corpus Act of 1679, 31 Car. 2, c. 2; and the Bill of Rights of 1688, 1 W. & M., st. 2, c. 2. The Petition of Right was adopted by the House of Commons and approved by Charles I shortly after the King's Bench denied one Darnel release on bail, Darnel's Case, 3 How. St. Tr. 1, 221-24 (1627), apparently on the Attorney General's argument that the Magna Carta did not apply to pretrial imprisonment. Id. at 39. The Petition recited the abuse of bail in cases like Darnel's, and prayed that "no freeman in any such manner as is before mentioned, be imprisoned or detained." 3 How. St. Tr. at 224, para. X.

When cases continued to arise in which prisoners were denied bail, Parliament, in

enacting the Habeas Corpus Act of 1679, recited that "many of the King's subjects have been and hereafter may be long detained in prison, in such cases where by law they are bailable," and provided a detailed habeas corpus procedure. 1679, 31 Car. 2, c. 2. This Act eliminated the procedural obstacles to the obtaining of bail, but it gave rise in turn to a judicial practice of setting impossibly high bail in order to prevent the release of prisoners.

Accordingly, Parliament enacted a Bill of Rights, which was accepted by William and Mary, and which recited that "excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects," Bill of Rights, 1688, 1 W. & M., st. 2, c. 2, preamble, clause 10. It concluded that "Excessive bail ought not to be required . . . ." Bill of Rights, 1688, 1 W. & M., st. 2, c. 2, rights, clause 10.

English jurisprudence subsequently evolved into a system in which defendants were presumptively released unless special circumstances required that they be held pending trial. 4 W. Blackstone, Commentaries on the Laws of England 295 (4th ed. 1770). Although in some instances a justice of the peace could find that a defendant should be detained because of his particular characteristics, an individualized determination was required on the basis generally of circumstances extrinsic to the offense charged. See 2 W. Hawkins, Pleas of the Crown 140-79 (6th ed. 1787).

Building upon this historical development in England, the American system of bail established even greater protections against unreasonable detention of defendants pending trial. Several of the principal colonies, such as Massachusetts (1641) and Pennsylvania (1682), simplified the English bail structure by making bail available as

a matter of right in all but capital cases. See, e.g., Massachusetts Body of Liberties, in Massachusetts Colonial Laws 37 (Whitmore ed. 1887); Laws Agreed Upon in England, May 3, 1682, in Proceedings Relative to Calling the Conventions of 1776 and 1790 at 26, 28 (1825) (Pennsylvania); N.C. Const., Declaration of Rights § X (Dec. 18, 1776). In 1785, a bill was passed by the Virginia legislature entirely eliminating judicial discretion as to whether bail should be granted: "if the crime be punishable in life or limb, or if it be manslaughter, and there be good cause to believe the party guilty thereof, he shall not be admitted to bail; all other cases are bailable." Jefferson, Autobiography, in 1 Writings of Thomas Jefferson 62, 481 (Ford ed. 1892).

Finally, in 1787, the Northwest Ordinance was adopted by Congress. It included a guarantee to territorial residents (to "forever remain unaltered unless by common consent") that:

> "all persons shall be bailable, unless for capital offences, where the proof shall be evident, or the presumption great; all fines shall be moderate; and no cruel or unusual punishments shall be inflicted . . . ." An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio, July 3, 1787, art. ii.

The First Congress enacted the same protections against unreasonable denial of pretrial release in the Judiciary Act of 1789 (1 Stat. 91 § 33), which expressly provided for an absolute right to bail in all noncapital federal criminal cases. Within a few days of passing the Judiciary Act, Congress adopted the eighth amendment of the Bill of Rights guaranteeing that "excessive bail shall not be required." 1 Stat. 91,§ 33 (1789).

During the course of the nineteenth century, these protections against unreasonable denial of pretrial release became virtually the universal pattern in American law. Today, 36 state constitutions declare bail available

as of right in all but capital cases,[13] and in seven others state statutes have the same effect.[14] In five more states the state constitution conformed to that pattern until amendments in the 1970s.[15] Even where bail

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13/ Ala. Const. art. I, § 16; Alaska Const. art. I, § 11; Ark. Const. art. 2, § 8; Cal. Const. art. I, § 12; Colo. Const. art. II, § 19; Conn. Const. art. I, § 8; Del. Const. art. I, § 12; Fla. Const. art. I, § 14; Idaho Const. art. I, § 6; Ill. Const. art. I, § 9; Ind. Const. art. I, § 17; Iowa Const. art. I, § 12; Kan. Const., Bill of Rights § 9; Ky. Const., Bill of Rights § 16; La. Const. art. I, § 18; Me. Const. art. I, § 10; Minn. Const. art. I, § 7; Miss. Const. art. III, § 29; Mo. Const. art. 1, § 20; Mont. Const. art. III, § 19; Nev. Const. art. I, § 7; N.J. Const. art. I, § 11; N.M. Const. art. II, § 13; N.D. Const. art. I, § 11; Ohio Const. art. I, § 9; Okla. Const. art. II, § 8; Or. Const. art. I, § 14; Pa. Const. art. I, § 14; R.I. Const., Declaration of Rights art. I, § 9; S.C. Const. art. I, § 15; S.D. Const., Bill of Rights art. VI, § 8; Tenn. Const., Declaration of Rights art. I, § 15; Vt. Const. ch. 2, § 32; Wash. Const. art. I, § 20; Wis. Const. art. 1, § 8; Wyo. Const. art. I, § 14.

14/ Ga. Code Ann. § 27-701.1 (1978); Hawaii Rev. Stat. § 804-3 (1976); Md. Rule Crim. Proc. 777; N.H. Rev. Stat. Ann. § 597:1 (1974); N.Y. Crim. Proc. § 530.10 (McKinney 1979); N.C. Gen. Stat. § 15-47 (1978); W. Va. Code § 62-1C-1(a) (1978).

15/ Ariz. Const. art. II, § 22; Mich. Const. art. I, § 15; Neb. Const. art. I, § 9; Tex. Const. art. I, § 11-a; Utah Const. art. I, § 8.

is discretionary, it must be based on a meaningful individualized hearing.16/

American jurisprudence has carved out only a few carefully circumscribed exceptions to the right of bail before trial, and each one of these is inextricably tied to preserving the integrity of the trial process itself. The capital crimes exception predates the Constitution and can be consistently found in colonial formulations of the right to bail. Its status as an historical exception to an acknowledged right is akin to that of the petty crimes exception to the right of trial by jury. Cf. District of Columbia v. Clawans, 300 U.S. 617 (1937). The exception for capital crimes stems from a fear that persons "facing a possible death sentence would likely flee regardless of what bail was set . . . ." United States v. Kennedy,

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16/ Ga. Code § 27-901; N.Y. Crim. Proc. Law (McKinney's) §§ 530.20-530.40; N.C. Gen. Stat. § 15A-534(b); Va. Code § 19.2-120.

618 F.2d 557, 559 (9th Cir. 1980). As Blackstone observed, "what is there that a man may not be induced to forfeit, to save his own life?" 4 W. Blackstone, Commentaries on the Laws of England 294 (4th ed. 1770). As the applicability of capital punishment has declined, however, the haphazard assortment of nonbailable charges, explicable only by the special penalty they carried,[17/] has declined correspondingly. See Tribe, An Ounce of Detention: Preventive Justice in the World of John Mitchell, 56 Va. L. Rev. 371, 377-78 (1970).

The additional exception recognized by modern courts for defendants who represent a threat to witnesses or judicial officers -- see, e.g., Mastrian v. Hedman, 326 F.2d 708,

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17/ The designation of crimes as capital in 1791 does not, of course, reflect that those crimes are considered serious today. Massachusetts at one time punished by death, adultery, witchcraft, blasphemy, and rebelliousness against parents. Haskins, Law and Authority in Early Massachusetts 204-11 (1960).

712 (8th Cir.), cert. denied, 376 U.S. 965 (1964); Carbo v. United States, 288 F.2d 686 (9th Cir.), cert. denied, 365 U.S. 861 (1961) -- is also tied to the need to assure a fair trial. Pretrial detention to determine competence to stand trial has a similar rationale. Bail itself has been traditionally linked to the goal of ensuring the defendant's presence at trial. These exceptions to the right to pretrial freedom are justifiable only to insure the same end as bail itself: a fair trial.

On the basis of the development of the bail system in this country, distinguished commentators have concluded that the eighth amendment was intended to confer upon noncapital defendants an absolute right to have bail set pending trial. Thus, after an exhaustive study of the origins of the eighth amendment, Professor Caleb Foote concluded:

> "From the analysis of the eighth amendment the only interpretation which seems to be consistent with its historical antecedents and

> what must have been its purpose is to find in it protection from pretrial detention which is secured against abridgement by legislation or the vagaries of judicial discretion. . . ." Foote Article, supra, at 1180.

See also Tribe, An Ounce of Detention: Preventive Justice in the World of John Mitchell, 56 Va. L. Rev. 371 (1970).

And indeed, until recently, there appeared little doubt about this purpose of the amendment. When faced with its first opportunity to delineate the right to bail, this Court in Stack v. Boyle, 342 U.S. 1 (1951), considered the right to be of constitutional dimensions:

> "This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Hudson v. Parker, 156 U.S. 277, 285 (1895). Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." 342 U.S. at 4.

Subsequently, in Trimble v. Stone, 187 F. Supp. 483, 484-85 (D.D.C. 1960), Judge Holtzoff concluded:

> "The right to bail before trial, except in capital cases, is guaranteed by the Bill of Rights. The Eighth Amendment . . . has invariably been construed as guaranteeing the right to bail by necessary implication and not merely meaning that when allowed, bail shall not be excessive. . . . The right to bail pending trial is absolute, except in capital cases, no matter how vicious the offense or how unsavory the past record of the defendant may be."

The question, however, of whether the eighth amendment guarantees an absolute right to bail for noncapital defendants need not be revisited in the present case. The American criminal justice system has always been held to guarantee defendants, at a minimum, a meaningful individualized inquiry into their fitness for pretrial release, according to traditional criteria beyond the offense charged. Indeed, Stack v. Boyle,

342 U.S. 1 (1951), expressly held that an individualized determination of eligibility for bail was central to the constitutional standard embodied in the eighth amendment.[18] In its universality this requirement is comparable to the reasonable doubt standard, In re Winship, 397 U.S. 358, 363 (1970), or the public right to open trials, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 579-80 (1980). Thus, the guarantee against unreasonable pretrial detention derives not only from the general commands of procedural due process but also from the specific prohibition on excessive bail.

18/ In the case chiefly relied upon by the State as support for the Nebraska provision -- Carlson v. Landon, 342 U.S. 524 (1952) -- release before deportation hearing was denied to alleged communist supporters based upon an individualized evaluation by the Attorney General rather than a magistrate. Moreover, deportation proceedings are most closely analogous to the traditional exception to a right of bail in capital cases because of the likelihood that a person would flee rather than risk the penalty of being forced to leave the country.

The Nebraska provision permits no individualized inquiry into the criteria traditionally considered in determining eligibility for pretrial release. Rather, the provision requires the pretrial imprisonment of defendants solely on the basis that it "appear[s] to the trial court that either the proof is evident or the presumption great." Parker v. Roth, supra, 278 N.W.2d at 115. There is no precedent in American jurisprudence for categorically denying pretrial release on the basis that the defendant is probably or presumptively guilty of a certain class of noncapital offenses, regardless of whether those crimes are viewed as heinous by the community.

The mere fact that the Nebraska provision dispenses with bail altogether, rather than setting an excessive bail, does not remove it from the scope of the bail clause and its concern with reasonable treatment of the accused. There has been a consensus in the federal courts that the excessive bail clause

prohibits unreasonable denials of bail as well as strictly "excessive" bail. See, e.g, Sistrunk v. Lyons, 646 F.2d 64, 70 n.23 (3d Cir. 1981); Atkins v. People of the State of Michigan, 644 F.2d 543, 549 (6th Cir.), cert. denied, 101 S. Ct. 3115 (1981); United States ex rel. Goodman v. Kehl, 456 F.2d 863, 868 (2d Cir. 1972); Mastrian v. Hedman, 326 F.2d 708, 710-11 (8th Cir.), cert. denied, 376 U.S. 965 (1964). Justice Butler, sitting on circuit, stated that "[t]he provision forbidding excessive bail would be futile if magistrates were left free to deny bail." United States v. Motlow, 10 F.2d 657, 659 (7th Cir. 1926).

It is inconsistent with both history and reason to suggest, as the State argues in the present case, that a legislature is free under the eighth amendment categorically to deny bail for an entire class of noncapital offenses. The flaw in the interpretation advanced by the State is that it would countenance intolerable consequences. Under

that interpretation, a legislature could, with constitutional impunity, deny pretrial bail for every offense, from traffic misdemeanors to felony murders. But, as the Eighth Circuit recogized in the present case, "[i]f legislative bodies are free to define any and all offenses as nonbailable, they may deprive the [eighth] amendment of any force and accused persons of any protection." Hunt v. Roth, supra, 648 F.2d at 1158.

There is not a shred of evidence to show that the framers of the Bill of Rights meant to deny American citizens the fundamental right to be free of unreasonable pretrial detention or to put the matter at the discretion of the legislature. Such an intention would have been contrary to the whole tenor of the Bill of Rights which protects against abridgement of fundamental freedoms by all three branches of government. The only interpretation of the eighth amendment which is consistent with these other guarantees is one which recognizes, at a minimum, a

fundamental right to a meaningful individualized determination of eligibility for pretrial release based on traditional criteria. An enactment such as the Nebraska provision which categorically denies pretrial release based solely on probable guilt is a blatant violation of that guarantee.

B. The Excessive Bail Clause of the Eighth Amendment Restrains States as well as the Federal Government from Unreasonable Denials of Bail.

While the eighth amendment's bail clause has not explicitly been held to control the actions of the states, the members of this Court have unanimously agreed that "the Eighth Amendment's proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment." Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979) (quoting Schilb v. Kuebel, 404 U.S. 357, 365 (1975)); id. at 149 n.1 (dissent). The fourteenth amendment protects a right against state action when the right

is "fundamental in the context of the criminal processes maintained by the American States." Duncan v. Louisiana, 391 U.S. 145, 150 n.14 (1968). By every standard this Court has applied, the protections of the excessive bail clause of the eighth amendment are fundamental.

In past cases, this Court has considered fundamental those rights that trace back to the early canons of English law. See Klopfer v. North Carolina, 386 U.S. 213, 223-26 (1967) (right to speedy trial "at the very foundation of our English Law Heritage"); Wolf v. Colorado, 338 U.S. 25, 28 (1949) (protection against unreasonable searches "enshrined in . . . basic constitutional documents of English-Speaking People"). By this standard, the credentials of the right to reasonable pretrial release are impeccable. Its lineage runs through the Statute of Westminster, 3 Ed., ch. 15 (1275), past Magna Carta (1215) to the Assize of Clarendon (1166) and beyond, to the earliest recorded English laws before

the Norman Conquest. See generally Duker, The Right to Bail, 42 Alb. L. Rev. 33, 34-50 (1977) (hereinafter cited as "Duker Article"). "The right to be bailed in certain cases is as old as the law of England itself." 1 J. Stephen, A History of the Criminal Law of England 233 (1883).

In determining the fundamental nature of an individual right, this Court also looks to the importance attached to it during the early years of the Republic. See Klopfer v. North Carolina, supra, 386 U.S. at 225 (fundamental nature of speedy trial right "evidenced by its guarantee in the constitutions of several of the states"); In re Oliver, 333 U.S. 257, 266-67 (1948) (early state charters also protected public trial). By this measure as well, bail is clearly fundamental. As noted above, the first body of law enacted in America established a right to be bailed in all but a limited number of cases. Massachusetts Body of Liberties, in Massachusetts Colonial Laws 37 (Whitmore ed.

1887). As was true of the right to speedy trial, the prohibition against excessive bail was included in the Virginia Declaration of Rights of 1776 even before it appeared in the eighth amendment. See Foote Article, supra, at 983. Also, as was true of the right to a public trial, such prohibitions were guaranteed by almost all of the original state constitutions. See Duker Article, supra, at 80-82.

Like other fundamental rights, the right to reasonable pretrial release has enjoyed continuing protection at both the state and federal levels. See, e.g., In re Oliver, supra, 333 U.S. at 273 (public trials are a "universal requirement of our federal and state governments"); In re Winship, supra, 397 U.S. at 363 (vital role of proof beyond a reasonable doubt in American criminal procedure makes it part of fourteenth amendment due process). The universal protection of a right to bail makes it, too, a fundamental privilege protected by the fourteenth

amendment. Even while the states were ratifying the Bill of Rights, Congress passed the Judiciary Act of 1789, guaranteeing a right to bail to those accused of noncapital federal offenses. See Foote Article, supra, at 971. That guarantee has continued unabated up to the present day. Fed. R. Crim. P. 46; 18 U.S.C. § 3146 (1976). Furthermore, as we have shown, the right to bail enjoys protection in nearly all of the states.

A final justification for incorporation of the eighth amendment into the guarantees of the due process clause is to ensure the continued protection of other fundamental rights. In Mapp v. Ohio, 367 U.S. 643 (1961), this Court directed states to comply with the exclusionary rule, not because it was a traditionally protected right, but because it was essential "to compel respect for the constitutional guaranty" against unreasonable searches. Id. at 656 (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)); see also Coleman v. Alabama, 399 U.S. 1, 8-9 (1970)

(assistance of counsel prior to trial necessary to safeguard fifth amendment rights). The right to reasonable pretrial release is similarly situated: it is necessary to protect other incorporated federal rights. The right to a fair trial is at the heart of our criminal process, and, as this Court recognized in Stack v. Boyle, supra, 342 U.S. at 4, "unhampered preparation of a defense" depends on pretrial freedom.

For these reasons, the rights guaranteed by the eighth amendment apply to the states through the due process clause of the fourteenth amendment. Further, as we have shown, the Nebraska provision plainly violates even the most minimal rights to a reasonable consideration of pretrial release held to be guaranteed by the eighth amendment. Thus, the Nebraska provision should be struck down as violative not only of general due process guarantees but also of the excessive bail clause of the eighth amendment.

IV.

THE NEBRASKA PROVISION VIOLATES THE SUBSTANTIVE GUARANTEES OF THE DUE PROCESS CLAUSE BECAUSE IT REQUIRES THE IMPRISONMENT OF CRIMINAL DEFENDANTS SOLELY ON THE BASIS OF A PRETRIAL FINDING THAT THE DEFENDANT IS LIKELY TO BE CONVICTED OF THE OFFENSE CHARGED

Under the Nebraska provision, the critical determination by which defendants will be deprived of their liberty prior to trial is based exclusively on evidence relating to the likelihood that the defendant committed the offense charged. Although the State claims that the purpose of the provision is to prevent the commission of crime by defendants awaiting trial (Appellant's Brief at 28), research in the area of pretrial crime reflects that a current charge does not in itself provide a reliable basis for predicting future criminal conduct.

It is settled that any legislative assumption or judicial inference leading to the deprivation of personal liberty:

> "must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." Leary v. United States, 395 U.S. 6, 36 (1969). (Emphasis supplied.)

The predictions of dangerousness cited by the State as support for the Nebraska provision are subject to this test and cannot pass it. No one can say with the "substantial assurance" required by the due process clause that the prediction of dangerousness advanced as the basis for the Nebraska provision is "more likely than not" to be accurate. Leary v. United States, supra. The two leading studies in the area found no reliable indicators for predicting which defendants are most likely to commit crimes during the period between their arrest and trial. Note, Preventive Detention: An Empirical Analysis, 6 Harv. C.R.-C.L. L. Rev. 289 (1971); National Bureau of Standards, Compilation and Use of

Criminal Court Data in Relation to Pre-Trial Release of Defendants: Pilot Study 160 (1970).[19]

Sex offenders do not, as the State suggests, represent a special class of defendants in this regard. In one recent study of defendants charged with sex offenses in the District of Columbia, 36 percent were rearrested during the pretrial period on various charges, only one of which resulted in conviction. K. Williams, The Prosecution of Sexual Assaults, 14-18 (1978). The State of Nebraska's own experience with the provision at issue here demonstrates its overinclusiveness. A survey conducted one year after adoption of the Nebraska provision[20] reflects

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19/ Both studies concluded, for example, that 5 percent of those who would have qualified for incarceration under the District of Columbia pretrial detention statute, D.C. Code 1973, § 23-1322 -- which provides for more refined efforts at prediction than the Nebraska provision -- were rearrested for violent or dangerous crimes during the pretrial period.

20/ The results of this study are set forth in the Joint Appendix at pp. 7-11.

that bail had been denied to 32 identified defendants charged with sexual offenses. Out of the 22 cases which reached final disposition, however, only two defendants were in fact convicted of forcible first degree sexual assault. Two defendants were acquitted after spending a total of 120 days in confinement, prosecutions were dismissed against 3 others, and the remainder were disposed of on convictions of or guilty pleas to bailable felonies or misdemeanors.

Because the State is, in effect, engaging in mere guesswork in amending its constitution so as to incarcerate persons charged with sex offenses pending trial, the Nebraska provision fails to achieve the measures of precision mandated by the due process clause: "[A] governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." NAACP v. Alabama, 377 U.S. 288, 307 (1964).

The due process clause mandates that in any legislation involving the curtailment of personal liberty, "less drastic" means of achieving the Congressional objective must be employed whenever feasible. Aptheker v. Secretary of State, 378 U.S. 500, 512-13 (1964); Shelton v. Tucker, 364 U.S. 479, 488 (1960). Yet individuals are deprived of their liberty under the Nebraska provision, despite the availability of numerous less drastic alternatives for dealing with commission of crime by persons awaiting trial.

Both the NBS and the Harvard studies found, for example, that more than half of all pretrial crime is committed after the first 90 days following arrest, indicating that the risk that a particular defendant might commit sexual offenses while awaiting trial could be significantly reduced simply by ensuring that the defendant is brought to trial promptly. Note, Preventive Detention: An Empirical Analysis, 6 Harv. C.R.-C.L. L.

Rev. at 389; National Bureau of Standards, supra at 165. Other alternatives, such as supervision by a parole officer or release to the custody of an agency or third party have proven effective in reducing pretrial crime, see P. Wice, Freedom for Sale, 77-78 (1974), and could be supplemented by increasing the penalties for crimes committed while on pretrial release. See generally Note, Preventive Detention Before Trial, 79 Harv. L. Rev. 1489, 1508-09 (1966).

Not only does the Nebraska provision preclude inquiry into less restrictive alternatives to pretrial imprisonment, it also prohibits the trial judge from taking into consideration any evidence unrelated to proof of the pending charge which would bear directly on whether the defendant was likely to commit sexual offenses if released.21/

21/ Even if as a result of the crime or otherwise the defendant was utterly incapacitated from committing any future sexual offense, the State of Nebraska would still insist on his incarceration as a danger to the community.

Testimony as to character or the absence of a criminal history, as well as psychiatric testimony as to the particular defendant's propensity for violent behavior, is treated as irrelevant under the Nebraska pretrial detention scheme. Thus, the only purpose in fact advanced by the Nebraska provision is an illegitimate interest in punishing persons charged with sex offenses before they are tried.

In Bell v. Wolfish, 441 U.S. 520, 535 (1979), this Court held that "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." And under the tests outlined in Wolfish for determining whether a particular sanction constitutes punishment, the imprisonment of criminal defendants on the basis of evidence relating solely to guilt is plainly punitive. Not only is "the behavior to which it applies . . . already a crime," but the deprivation of liberty involved is also "excessive in

relation to the alternative purpose assigned" -- that of preventing the commission of sexual offenses by defendants awaiting trial. See Bell v. Wolfish, supra, 441 U.S. at 537-38, following Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963). Moreover, the supporters of the Nebraska provision have evidenced a clear desire for retribution based upon a single notorious incident and an undisguised assumption that all persons charged with sex offenses are guilty of those crimes.22/

Regardless of whether it is ever permissible for a state to take a defendant's criminal "propensities" into account in determining eligibility for bail -- and the

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22/ As the State puts it: "The people of the State of Nebraska have made a . . . determination that these particular sex offenders . . . constituted a distinct class of criminals. . . . [T]he differing treatment between this distinct, specific and narrow class of rapists and other criminal offenders is justified . . . ." Appellant's Brief at 28, 32 (emphasis supplied). While rape is undoubtedly a heinous crime, that does justify punishment of persons not yet found guilty of any offense.

ACLU submits that it is not -- the Nebraska provision challenged here cannot survive constitutional scrutiny. The system which the State of Nebraska has set into motion through adoption of this amendment is not a system of preventive detention but a system which achieves pretrial punishment of persons charged with a single class of noncapital offenses. The provision must be struck down as violative of the substantive guarantees of the due process clause.

CONCLUSION

For the foregoing reasons, this Court should affirm the comprehensive and well-reasoned opinion of the Eighth Circuit in the present case. The Nebraska provision should be struck down as void and unenforceable.

Respectfully submitted,

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